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IN THE

Supreme Court of the United States

October Term, 1973

No. 74 73 - 6617

PAUL TOPOROFF,

Petitioner-Appellant,

against

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT; BERNARD J. MALCOLM, New York City Commissioner of Correction; JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men; JAMES GORMAN, Deputy Warden, Manhattan Court Detention Pens,

Respondents-Appellees.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

PETITION NOT PRINTED

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Preliminary Statement

Petitioner **Paul Toporoff** seeks a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered on January 30, 1974, unanimously affirming an order of the United States District Court for the Southern District of New York, entered on June 26, 1973, denying his petition for a writ of habeas corpus.

Statement of the Case

In an indictment filed March 6, 1971, by a New York County Grand Jury, the petitioner was charged with burglary in the third degree, grand larceny in the second degree, criminal possession of stolen property in the second degree and attempted grand larceny in the second degree, Indictment No. 791-71. It was specifically charged that petitioner stole certain furs from the American Fur Coat Co. Inc. It was also charged that the petitioner attempted to extort money from Benjamin Dretel in exchange for returning the furs.

On June 23, 1971, petitioner offered to plead guilty to attempted grand larceny in the second degree in satisfaction of the indictment. N. Y. Penal Law §110/155.35. Before acceptance of the plea, the petitioner acknowledged that nobody had made any promises to him of any kind as to what his sentence would be as a result of his plea of guilty (mins. of plea, June 23, 1971, at p. 5).

After acceptance of the plea, the court informed the petitioner that while "*it was not making any promises, the petitioner could help himself by making an attempt at full restitution prior to the date of sentence*":

> "The Court: I am going to set the date for sentence at September 14th, at which time I want a full probation report, September 14th. I am going to tell you this, Mr. Toporoff: I make no promises, but I will tell you that the smartest thing that you can do to help yourself, I know you want to help yourself—right?

"The Defendant: Right.

"The Court: —is to start immediately to make full restitution. Do you understand?

"The Defendant: Yes, sir.

"The Court: For the amount that you stole in furs. Now, I am going to continue you on bail and put you under the supervision and surveillance of the Probation Department pending sentence on September 14th. Do you understand?

"The Defendant: Yes, sir.

"The Court: From now until September 14th, which is two and a half months from now, a little more, the Probation Department is asked to open up an escrow account and you start making restitution payments in that escrow account to the Probation Department.

"The Defendant: To the Probation Department?

"The Court: To the Probation Department, nobody else. All payments are to be made through the Probation Department—the restitution will be made through the Probation Department. And we will take a look at the situation on September 14th. They, the Probation Department, will investigate and determine the amount of restitution that should in justice be made. They will also determine whether or not, and they will report back to me, whether or not you are making restitution in such amounts and in such a manner as they feel is fair and shows good faith on your part.

"Now, do we understand each other?

"The Defendant: Yes, sir.

"The Court: And what I am simply trying to tell you is that if full restitution is made, you will have done the most important thing to help yourself in this case. And I am going to insist on absolutely full restitution before I am going to give you any consideration because, very frankly, you have been in trouble

before. And if you don't do the right thing, why you can expect jail-time. I am not looking to give you jail-time. It is never a pleasure to me to give a person jail-time. So you fate is very much in your hands right now.

"Do you understand that?

"The Defendant: Yes, sir.

"The Court: All right." (*id.* at 6-8)

Prior to the imposition of sentence on October 1, 1971, petitioner moved to withdraw his plea of guilty because he could not make substantial restitution. The court denied the motion to withdraw the plea:

"The Court: Well, in order to set the record straight, I have no hesitancy in telling you first of all, Mr. Gilbert, I respect you for the plea that you are making on behalf of your client. You certainly have attempted to inject yourself, not only professionally, but personally; shown a great deal of concern for your client, and that's I think, admirable.

"Now I have no hesitancy in telling you that I have told you, I have told the District Attorney; I have stated in open Court prior to and at the time this plea was taken, that while this defendant, this was not a crime of violence, it nevertheless was a crime, and I didn't feel as a Justice of this Court that I could simply pat this man on the back and say, 'Don't do it again.' He has had one prior conflict with the law, which resulted in a D.O.R. Undoubtedly that was because some restitution was made and now here he is a second time, but I did state to you, to the District Attorney, and in open Court; that since the amount was moderately large, not overly large in comparison to some of the cases we get here, I would give this man a suspended sentence, and put him on probation. I would put him on probation provided he made sub-

stantial restitution, and I mentioned the sum which I got from my probation report of $8,000, and I paid if he paid a substantial amount immediately, and then made arrangements with the Probation Department to continue that and showed his good faith, I would not send him to jail, but I also told you and I told the District Attorney, and I mentioned in open Court, and this man knows, Mr. Toporoff knows that I told him that if he couldn't and didn't make substantial restitution, that he would have to expect to go to jail.

"I don't relish sending people to jail, but that's the unfortunate part of my job.

"Now your application to withdraw the plea, it seems to me, has no legal grounds whatsoever. It is predicated upon the fact that he can take one of two alternatives I hold out to him, either make substantial restitution, or go to jail. He can't make the restitution, and there is nothing wrong with the plea. There is no indication that this man is not guilty, or that he wasn't absolutely candid when he admitted his guilt before this Court, so I see not reason whatsoever, no legal reason to permit him to withdraw his plea.

"His attempted restitution at the rate of ten dollars a week is ludicrous. Eight thousand dollars at the rate of eight dollars a week would take sixteen years to pay, and I don't think that the Court should countenance that sort of thing.

"Accordingly, I am constrained to deny your application to withdraw the plea, and the defendant will now be arraigned for sentence." (mins. of sentence, October 1, 1971, at pp. 2-8)

Thereafter, petitioner filed a motion for a writ of error *coram nobis* to set aside the judgment, claiming that the court had imposed an illegal sentence of imprisonment. On February 9, 1972, Justice Davidson denied the motion,

stating: "The offer [of $10 weekly payments towards restitution] was totally inadequate and in no sense could be regarded as a sincere and genuine offer to restore what he had stolen, especially in light of the fact that petitioner disputed the total amount which he stole claiming that he took approximately $2,200. Whereas the complainant claimed over $5,000 had been stolen." Leave to appeal to the Appellate Division, First Department, was denied on April 27, 1972 (McNally, J.).

On April, 1973, the Appellate Division unanimously affirmed without opinion the judgment of conviction. Petitioner had argued that he was denied equal protection because the court below had sentenced him to imprisonment after he protested on inability to pay more than ten dollars a week toward restitution.

On May 15, 1973, Judge Wachtler denied petitioner leave to appeal to the New York Court of Appeals.

On June 4, 1973, Toporoff, arguing that the prison sentence imposed violated his right to equal protection under the Fourteenth Amendment, applied for a petition for a writ of habeas corpus in the Southern District of New York. Judge Charles M. Mentzner denied the application on June 26, 1973, stating:

> "Petitioner claims that had he been able to make restitution when given the opportunity, he would not have been sentenced to a term in jail. The sentencing judge made it clear on the record. Thus, petitioner argues, he is being given a harsher punishment simply because he is indigent, which is a denial of his equal protection rights. However, this is not a proper inter-

pretation of what happened. The court was prepared to impose a jail term but would temper this sentence if provision for restitution, acceptable to the court, was made."

The court further stated that

"The sentencing judge may view restitution as a mitigating circumstance in imposing sentence. Since the restitution called for was the value of the goods stolen by petitioner, he did, at some point, have the money with which to make restitution and his inability to do so was the result of his own actions."

On January 30, 1974, the Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court, without opinion.

Petitioner seeks certiorari pursuant to 28 USC §1254 (1).

ARGUMENT

Certiorari should not be granted to review a state court finding, supported by the federal habeas corpus court, that petitioner failed to make a good faith attempt at restitution.

On June 23, 1971, petitioner after consultation with his counsel voluntarily pleaded guilty to the crime of attempted grand larceny in the second degree (N.Y. Penal Law §110/155.35) in satisfaction of the indictment. At the time of plea, Toporoff acknowledged that no promises concerning sentence had been made to him. Thereafter, the court indicated that while:

"*I make no promises*—if full restitution is made, you will have done the most important think to help

> yourself in this case. And I am going to insist on absolutely full restitution before I am going to give you any consideration because, very frankly, you have been in trouble before, and if you don't do the right thing, why you can expect jail-time. I am not looking to give you jail-time. It is never a pleasure to me to give a person jail-time. So your fate is very much in your hands right now" (*emphasis added*).

On October 1, 1971, petitioner appeared for sentencing and at that time moved to withdraw his plea because there was a dispute as to the exact value of the furs stolen and because he could not make substantial restitution. The court denied the application to withdraw the plea, stating:

> "Now your application to withdraw the plea, it seems to me, has no legal ground whatsoever. It is predicated upon the fact that he can take one of two alternatives I hold out to him, either make substantial restitution or go to jail. He can't make the restitution, and there is nothing wrong with the plea. There is no indication that this man is not guilty, or that he wasn't absolutely candid when he admitted his guilt before this court, so I see no reason whatsoever, no legal reason to permit him to withdraw his plea.
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> "His attempted restitution at the rate of ten dollars a week is ludicrous. Eight thousand dollars at the rate of eight dollars a week would take sixteen years to pay, and I don't think that the court should countenace that sort of thing." (mins. of sentence, October 1, 1971, p. 28).*

The court then sentenced petitioner to one year's imprisonment.

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* §65.10(f) of the New York Penal Law provides for restitution as a condition relating to a sentence of probation or as conditional discharge.

Petitioner now argues that he was subjected to imprisonment solely because of his indigency. This claim is without merit. The record is clear that the sentence of one year's imprisonment was imposed upon petitioner not because of his indigency or as a result of discriminatory state action, but because he had not endeavored in good faith to made adequate restitution.

Petitioner was accorded a benefit by the court's granting to him an opportunity to make restitution prior to the imposition of sentence. However, having squandered the proceeds of his crime, Toporoff was able to pay only ten dollars in weekly installments toward restitution of eight thousand dollars. As the District Court stated, "Since the restitution called for was the value of the goods stolen by petitioner, he did, at some point, have the money with which to make restitution and his inability to do so was the result of his own actions." Therefore, the sentencing court properly exercised its discretion in determining that a term of imprisonment was the proper sentence because petitioner's meager payments of ten dollars a week were inadquate, and not a sincere and genuine offer.

Moreover, appellant's reliance on *Williams* v. *Illinois*, 399 U.S. 235 (1969), and *Tate* v. *Short*, 401 U.S. 395 (1971), is misplaced. In *Williams*, the Court held that if the defendant is unable to pay the fine, a combination of a term of imprisonment and a period of incarceration for nonpayment aggregating more than the authorized term of imprisonment, violates the defendant's right to equal protection of the laws and the constitutional ban on excessive fines. Similarly, in *Tate*, the Court held that it is a viola-

tion of the equal protection clause of the Fourteenth Amendment to imprison an indigent for failing to make immediate payment of a fine, even in a case where the only sentence permitted is a fine. The Court also stated, "We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." *See also Morgan* v. *Wofford*, 472 F.2d 822 (5th Cir. 1973), *fn.* 6.

Similarly, since petitioner was at one time able to make restitution through the proceeds of the crime but apparently squandered them away, he was not denied equal protection of the law.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1974